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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICKY ORTA,

Petitioner,

-v-

DECISION and ORDER
05-CV-645S

ISRAEL RIVERA, Supt. ,

Respondent.

By Order filed November 13, 2007 (Docket No. 18), the Court directed that, to the extent that the Fourth and Fifth grounds for relief raised in Petitioner's Amended Petition for a Writ of Habeas Corpus were unexhausted,¹ said claims were dismissed without prejudice, subject to the condition that Petitioner seek to exhaust the claims in state court and then immediately return to this Court upon exhaustion. Now before the Court is Petitioner's Motion to Vacate the Stay (Docket No. 19) on the basis that the New York State Supreme Court Appellate Division, Fourth Department, denied him leave to appeal from the denial of his N.Y.CRIM.PROC.L., § 440.10 motion ("§ 440.10") and Petitioner has thus exhausted his state court remedies with respect to the Fourth and Fifth grounds for relief raised in the Amended Petition.

IT IS HEREBY ORDERED, that Petitioner's Motion to Vacate the stay is granted,

¹The Fourth and Fifth Grounds are: (4) the prosecution improperly charged both intentional and depraved indifference murder depriving petitioner of his right to a fair trial, and (5) petitioner received ineffective assistance of trial counsel based on trial counsel's failure to raise the issue that the prosecution impermissibly charged and presented to the jury both intentional murder and depraved indifference murder. (Docket No. 12-2, Amended Petition, ¶ 22, Grounds Four and Five; Docket No. 18, Order at 9-10).

and the abeyance Order of November 13, 2007 (Docket No. 18), is hereby rescinded and the claims dismissed by that order are hereby reinstated in the Amended Petition. Respondent is directed to take whatever action is necessary to ensure that the official state court records of Petitioner's § 440.10 motion are provided to the Court as soon as possible;

FURTHER, that the Clerk of the Court is directed to detach the Amended Petition from the Renewed Motion for a Stay and Amend Petition (Docket No. 12-2), and docket it separately as "Amended Petition"; and

FURTHER, that Respondent shall file and serve an answer and memorandum of law in response to the amended petition within **45 days** after the receipt of this Order. Petitioner shall file a reply, if any, to the answer and memorandum of law within **30 days** of the receipt of the answer and memorandum of law.

SO ORDERED.

Dated: August 9, 2008
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge